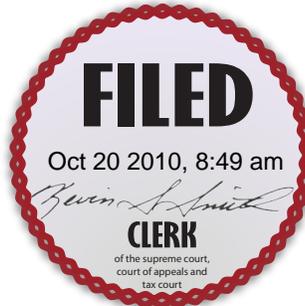


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**IN THE
COURT OF APPEALS OF INDIANA**

KEESHA JOHNSON,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-1002-CR-98
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose D. Salinas, Judge
Cause No. 49G14-0905-FD-46598

October 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

Keesha Johnson was giving a friend a ride when she was pulled over for a traffic infraction. The police officer found a bag of marijuana under the front passenger seat where her friend had been sitting. Johnson was charged and convicted of possession of marijuana. She asserts that the State failed to prove beyond a reasonable doubt that she knew the marijuana was in her vehicle. We agree and reverse her conviction.

Facts and Procedural History

The facts most favorable to the judgment show that on the evening of May 9, 2009, Indianapolis Police Detective Brady Ball was parked in an unmarked police car observing the intersection of Rural and Brookside Streets in Indianapolis. Detective Ball saw a white SUV, driven by Johnson, fail to stop at a red light before turning right onto Rural. Detective Ball followed the SUV, which turned right onto 11th Street. When the SUV was about halfway down the block, Detective Ball activated his red and blue lights to initiate a traffic stop. The SUV continued the remainder of the block, stopped for about two or three seconds, then continued roughly three-quarters of a block and pulled into the driveway of Johnson's residence.

Detective Ball stopped his car and walked to the passenger side of the SUV. Ralph Reed was sitting in the front passenger seat. As Detective Ball leaned in to talk to Reed, Detective Ball could smell marijuana on Reed's clothing and on his breath. After Detective Ball identified Johnson and Reed and determined that Johnson was the owner of the vehicle, he asked them to exit and sit on the rear of the SUV. He detected no odor of marijuana

emanating from Johnson. Detective Ball asked Johnson for permission to search her vehicle. She said yes, but Reed interrupted her and said something to her “under his breath,” and she changed her answer to no. Tr. at 33.¹ Detective Ball read Johnson and Reed their Miranda rights and retrieved his canine partner to sniff the open air around the SUV. He took the dog first to the back of the vehicle, went around to the passenger side, then in front of the SUV to the driver’s side. At the driver’s window, which was open, the dog “sat to a final alert which is a positive indication for the presence of narcotics on the driver’s side.” *Id.* at 20.

Detective Ball noticed that Reed was acting “a little suspicious,” so he moved Reed to the steps of Johnson’s residence to keep him in view. *Id.* at 34. Detective Ball searched the interior of the vehicle beginning on the driver’s side. Johnson informed him that she had a registered hand gun in her purse, which he found. Detective Ball proceeded to the passenger side, looked under the passenger seat, and found a bag that he believed held marijuana. At that time, Reed fled. Detective Ball pursued him a short distance but decided to go back to the SUV and secure Johnson and the marijuana.

The marijuana was in a Ziploc-type one-gallon bag, which was inside a brown plastic grocery bag. Later analysis determined that 220 grams of marijuana were in the bag. Detective Ball asked Johnson if she knew that the marijuana was in the car, and she said that she knew nothing about it. *Id.* at 27. She told Detective Ball that she was giving Reed a ride. *Id.* at 26-27.

¹ Detective Ball also testified that “[Johnson]he kind of went back and forth, and then there was a conversation between her and Mr. Reed and she denied the consent to search.” Tr. at 17.

The State charged Johnson with class D felony possession of marijuana. Johnson was convicted following a bench trial. This appeal ensued.

Discussion and Decision

Johnson challenges the sufficiency of the evidence supporting her conviction. Our standard of review is well settled:

We do not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt.

Gomez v. State, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009) (citations omitted), *trans. denied*.

To convict Johnson of possession of marijuana as a class D felony, the State was required to prove beyond a reasonable doubt that Johnson knowingly or intentionally possessed thirty or more grams of marijuana. Ind. Code § 35-48-4-11; Appellant's App. at 20. Either actual or constructive possession can support a finding that a defendant possessed the controlled substance. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). Johnson did not actually physically possess the marijuana, and she contends that the State failed to prove constructive possession. We observe that "[c]onstructive possession is established by showing the defendant has the intent and capability to maintain dominion and control over the contraband." *Godar v. State*, 643 N.E.2d 12, 14 (Ind. Ct. App. 1994), *trans. denied*.

Here, Johnson challenges not her *capability* to maintain dominion and control over the marijuana, but rather her *intent* to maintain dominion and control. An inference of intent to

control contraband is supported by circumstances such as (1) the possession of the drug on the defendant's person, (2) that the defendant had smoked marijuana from the same bag earlier, (3) flight, (4) proximity to contraband in plain view, (5) furtive conduct, and (6) the smell of marijuana emanating from the vehicle. *Id.* at 15. Because Reed was present in the vehicle and the marijuana was found under his seat, he also had the capability to maintain dominion and control of the marijuana, and therefore, this is an instance of non-exclusive possession. Although "[a] substance can be possessed jointly by the defendant and another without any showing that the defendant had actual physical control thereof ... when possession is nonexclusive, [the State must show] that the defendant had *actual knowledge* of the presence and illegal character of the substance." *Id.* at 14 (citation omitted) (emphasis added).

In reviewing Johnson's challenge to the sufficiency of the evidence, we find the *Godar* case instructive. That case, too, involved a driver, a passenger, and nonexclusive possession of marijuana. In *Godar*, a police officer watched a car stop briefly and the driver and passenger exchange places. After the officer stopped the vehicle, Godar stepped from the driver's side of the car, and the officer smelled alcohol on Godar's breath and observed that his eyes were glazed and bloodshot. Melborne Worrell was in the front passenger seat, and the officer noticed that Worrell was agitated. Two other passengers were in the back. The officer discovered 5.77 grams of marijuana underneath the front passenger seat.

Both Godar and Worrell were charged with possession of marijuana.² A jury found Godar guilty as charged. On appeal, Godar argued that the State failed to show that he constructively possessed the marijuana. The *Godar* court agreed, reasoning as follows:

Here, the State failed to produce additional evidence inferring Godar's knowledge of the presence of the marijuana and its illegal character. Although Godar had originally been the front seat passenger, which would place him in closest proximity to the marijuana, it was not in plain view to infer his knowledge of its presence. Mere presence where drugs are located or association with persons who possess drugs is not alone sufficient to support a finding of constructive possession. . . . Godar did not act furtively to suggest that he placed the marijuana underneath the front passenger seat. His conviction is reversed.

Id. at 15 (citation omitted).

In the instant case, the record shows that the marijuana was under the front passenger seat. There is no evidence that it was in Johnson's plain view or that she had earlier smoked marijuana from the bag. In addition, Detective Ball testified that he did not detect the smell of marijuana emanating from Johnson. Tr. at 32. Rather, he testified that the smell of marijuana emanated from Reed. There is no evidence that Detective Ball smelled marijuana coming from the SUV.³ Further, there is no evidence that Johnson acted furtively or that she attempted to flee. Thus, there is less evidence of possession in this case than was present in *Godar*, where Godar had been sitting in the passenger seat and therefore was at some point in closest proximity to the marijuana.

² Godar was also charged with operating a vehicle while intoxicated.

³ Detective Ball testified that once the plastic grocery bag was opened, the smell of marijuana was "pretty strong." Tr. at 27. Therefore, the odor was apparent only after the bag was opened.

Nevertheless, the State argues that the totality of the circumstances indicates that Johnson had actual knowledge of the marijuana in her car. The State contends that Johnson declined to stop her car immediately when Detective Ball turned his lights on, which gives rise to a reasonable inference that she paused to stash the marijuana under the passenger seat. However, Johnson stopped her car in the driveway of her own home. Detective Ball testified that when drivers are close to home, they sometimes delay pulling over so that they can stop in their own driveways. *Id.* at 31. Detective Ball also testified that Johnson traveled only half a block farther than what he might normally expect. *Id.* at 30. Johnson's failure to immediately stop can be readily explained by the fact that her house was less than a block away. Under these circumstances, the State's suggested inference is not a reasonable one.

The State also asserts that Detective Ball's dog indicated that the "source" of the marijuana odor was the driver's side. *Id.* at 5. The State contends that even though the marijuana was found on the passenger's side, there is no testimony that the drugs had not been on the driver's side. However, if the odor of marijuana was emanating from the car, and marijuana was indeed present in the car, then the strongest source of that odor would necessarily be the marijuana itself. Moreover, there is evidence that the driver's side window was open, but no evidence as to whether the passenger's side window was open, or whether there was a breeze and which way it was blowing. On this record, the dog's actions cannot support a reasonable inference that the marijuana had ever been on the driver's side.

The State points out that Johnson had a handgun and that Detective Ball testified that handgun ownership is "consistent with someone who does deal drugs." Tr. at 39. We

observe that the handgun was lawfully registered, and that Johnson has a constitutional right to own a gun. U.S. CONST., amend. II; IND. CONST., art. 1, § 32. We decline to infer criminal activity as a corollary to the exercise of a constitutionally guaranteed right under these circumstances.

The State argues that the bags were translucent and the volume of marijuana was great, so it would have been difficult for Johnson not to have seen or smelled it. We note, however, that the plastic grocery bag was brown, not clear. Furthermore, the grocery bag was not in plain view. And, although Detective Ball testified that Reed smelled like marijuana, there is no evidence that the smell of marijuana came from the car. We may infer that Johnson could have smelled marijuana on Reed, but that does not support a reasonable inference that she had actual knowledge that Reed had marijuana with him. *Cf. Corrao v. State*, 154 Ind. App. 525, 533-34, 290 N.E.2d 484, 488 (1972) (officer's testimony that odor of freshly cut marijuana emanated from car sufficient to show that four passengers of car had knowledge of three plastic bags and one mailbag of marijuana in car's trunk, but constructive possession could be imputed only to driver and owner of car because back seat passengers had no control over car).

Lastly, the State asserts that Johnson vacillated about giving consent to search her vehicle and ultimately refused. The State argues that when "weighed with the remaining evidence, these actions indicate evasiveness and knowledge of the marijuana." Appellee's Br. at 5. We observe that initially, Johnson consented to the search of her vehicle. Then Reed spoke to her. The record does not reveal what Reed said to Johnson. The reason she

changed her mind about the search is pure speculation. In light of all the evidence, Johnson's vacillation, standing alone, does not support a reasonable inference that she had actual knowledge of the marijuana.

Based on the foregoing, we conclude that there was insufficient evidence to prove beyond a reasonable doubt that Johnson had actual knowledge of the marijuana under the passenger seat of her car, and thus the State failed to show that she had constructive possession of the marijuana. Accordingly, we reverse her conviction for class D felony possession of marijuana. Because we reverse due to insufficient evidence, double jeopardy principles bar retrial. *Neff v. State*, 915 N.E.2d 1026, 1036 (Ind. Ct. App. 2009), *trans. denied* (2010).

Reversed.

FRIEDLANDER, J., and BARNES, J., concur.